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91-2056

No. ——

Supreme Court, U.S.
FILED
JUN 24 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BEA JACOBSON, *et al.*,
Petitioners,

v.

CINCINNATI BOARD OF EDUCATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a public school district employ racial classifications to deprive teachers of favorable job assignments in order to maintain a racial quota, in the absence of evidence that such racial classifications are required to remedy past racial discrimination?

2. When racial classifications are implemented in a manner that deprives both African-American and white teachers of favorable job assignments, may a court apply an intermediate level of constitutional scrutiny, rather than the strict constitutional scrutiny mandated by this Court in *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986), and *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989)?

3. Does a desegregation consent decree provide justification for the racial classification of teachers with respect to job assignments, where the decree was adopted without proof of past racial discrimination by the public school district?

LISTING OF ADDITIONAL PARTIES

Petitioners

LINDA YOUNG, MARTHA RETIC, MARILYN ROSSER, ROSA MONTGOMERY, THIRILEEN KING, BONITA WHITE, and CLARICE CUMMINGS.

Respondents

DR. LEE ETTA POWELL, Superintendent of the Cincinnati City School District.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The August 16, 1990 decision of the United States District Court for the Southern District of Ohio, Western Division, has not been officially reported. It was filed in the district court in case number C-1-90-449, and is set out in the appendix at App. 6a.

The September 13, 1990 decision of district court has not been officially reported. It is set out in the appendix at App. 30a.

The March 31, 1992 decision of the United States Court of Appeals for the Sixth Circuit is reported at 961 F.2d 100, and is set out in the appendix at App. 1a.

JURISDICTION

The decision of the Sixth Circuit from which petitioners seek a writ of certiorari was filed on March 31, 1992. The mandate of that court issued on April 22, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The district court was vested with jurisdiction over the complaint in this case pursuant to 28 U.S.C. §§ 1441, 1446, and 1331.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the text of constitutional, statutory, and other provisions involved in this case is set out in the appendix beginning at App. 35a.

STATEMENT OF THE CASE

On May 24, 1990, Petitioners Bea Jacobson, Linda Young, Martha Retic, Marilyn Rosser, Rosa Montgomery, Thirileen King, Bonita White, Clarice Cummings ("Petitioners"), and their collective bargaining representative the Cincinnati Federation of Teachers, commenced the instant action against Respondents Cincinnati Board of Education ("Board") and its Superintendent, Dr. Lee Etta Powell("Superintendent") (collectively, "Respondents") in the Court of Common Pleas for Hamilton County, Ohio. In their complaint, Petitioners alleged that they were either involuntarily transferred, or denied a requested transfer, to another school by Respondents solely on the basis of their race in violation of the applicable collective bargaining agreement, 42 U.S.C. § 1983, and the Equal Protection Clause of the Fourteenth Amendment.[1] On June 7, 1990, the case was timely re-

[1] Petitioners and Plaintiff Cincinnati Federation of Teachers were all appellants in this case before the United States Court of Appeals for the Sixth Circuit. Petitioners have chosen not to pursue their claims under the collective bargaining agreement herein, and accordingly, the Cincinnati Federation of Teachers is not a Petitioner.

moved by Respondents to the United States District Court for the Southern District of Ohio, Western Division.

Although this case was commenced in 1990, a historical background or prior cases alleging racial discrimination within the Cincinnati Public Schools is necessary for a proper understanding of the claims asserted by Petitioners. On December 9, 1969, the United States Court of Appeals for the Sixth Circuit, affirming the decision of the United States District Court for the Southern District of Ohio, Western Division, rejected the claim of a class of African-American students that the Board had discriminated on the basis of race in the hiring or assignment of teachers:

> Appellants further complain of discrimination in hiring and assigning of school personnel. As of 1964-65, Negroes comprised 626.5 or 21.20% of the teaching staff. We find no evidence of discrimination. There was no constitutional duty on the part of the Board to balance the races in teachers' employment and assignments. Teachers should be selected primarily on the basis of merit.
>
> * * * *
>
> There is no evidence in the record that the Board assigned teachers or other staff members on the basis of race. The evidence demonstrates the contrary, namely, that the Board was actively attempting to integrate its staff at all levels . . . .

Deal v. Cincinnati Bd. of Educ., 419 F.2d 1387, 1393-94 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971).

Nevertheless, on January 14, 1974, the Board, without receiving evidence or making a finding that it had ever discriminated against a single teacher in his or her assignment to schools within the district, and despite a federal court determination that it had not so discriminated, established a policy for the assignment of teachers to schools within the district based upon a racial classification.

> Voluntary efforts are now underway for the balancing of teaching staffs in each school to approximate the racial balance of the teaching staff in the entire district. These voluntary efforts should be continued. However, if they do not achieve a balance in each school approximating the balance of the system as a whole, then the Superintendent is directed mandatorily to assign teachers on such a basis that each school, commencing September 1, 1974, will have a racial balance of teachers substantially approximating the balance of the teaching staff as a whole.

Board Minutes (Jan. 14, 1974). The Board clarified its racial balance policy on March 18, 1974:

> The 75-25% guideline developed of course is a bench mark and variations are necessary because of certification, other needs, and the different percentages in the elementary and secondary levels. To clarify these situations we request that the basis for calculating at the elementary level be the actual percentage of black teachers at the elementary level; that is, 28.4%, and at the secondary level, the actual percentage of black teachers, that is 23.7%. Variations from the above percentages should not exceed 5% above or below the base.
>
> * * * *
>
> We propose that we work toward the percentages of 28.4% at the elementary level and 23.7% at the secondary level.
>
> (a) through voluntary teacher transfer until March 22, 1974 and through the hiring and assigning of new teachers up to September 1, 1974, and
>
> (b) through mandatory teacher transfers after June 1, 1974 and before September 1, 1974 except where more than 20% of the teaching staff is to be transferred. * * *

Board Minutes (March 18, 1974).

Before the district court, Director of Personnel Roger Effron ("Effron") testified that the Board had achieved its racial balance objectives under this policy by 1976. Trans. at 105 (July 26, 1990). Substantial compliance with the racial balance policy was maintained throughout the 1980's without resort to involuntary reassignments. *Id.* at 111 (Pl.Ex.46).

On May 29, 1974, a second lawsuit was commenced by a group of Cincinnati school children and their parents against the Board alleging that it had "established and maintained the Cincinnati Public Schools as a racially segregated school system." *Bronson v. Board of Educ.*, 604 F.Supp. 68, 70 (S.D.Ohio 1984).[2] The *Bronson* litigation continued until June 22, 1984 when it was settled by consent decree. *Bronson v. Board of Educ.*, 604 F. Supp. 68 (S.D.Ohio 1984).

Despite the express holding of the Sixth Circuit in *Deal* that there had been no discrimination in the assignment of teachers within the Cincinnati school system, and despite the fact that the Board acknowledged that it had achieved "racial balance" among its teaching staff pursuant to its racial balance policy by 1976, the following provision was included in the consent decree:

---

[2] During the course of the *Bronson* litigation, the case was twice before the United States Court of Appeals for the Sixth Circuit on the issue of the preclusive effect of the *Deal* litigation. The Sixth Circuit concluded that the *Bronson* plaintiffs were:

> foreclose[d] . . . from showing that the defendants did, prior to July 26, 1965, act with a segregative intent or that the actions, inactions or policies of the Board prior to that date violated the constitutional rights of minority pupils or their parents. These issues have been decided and under the issue preclusion application of collateral estoppel may not be reopened.

Bronson v. Board of Educ., 525 F.2d 344, 349 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). See also *Bronson v. Board of Educ.*, 687 F.2d 836 (6th Cir. 1982).

> The Cincinnati Board of Education currently has in force a policy which requires that the staff in each of its schools has a racial composition which is within 5% of the racial composition of the staff in the district as a whole. The Board shall maintain that policy in effect and take the steps necessary to assure that it is enforced.

Bronson Consent Decree at 12.[3]

In a report to the Board on December 11, 1989, the Superintendent explained how the policy affected the assignment of teachers who had requested transfers under the applicable collective bargaining agreement:

> *Transfers.* All teachers have the opportunity to apply for a voluntary transfer under the *Collective Bargaining Agreement.* * * * The racial balance factor is generally applied as follows:
>
> A. School is above the maximum [for black teachers]—only white teachers would be entitled to transfer into the school.
>
> B. School is at the mean or within the range of compliance—either white or black teachers would be entitled to transfer into the school.
>
> C. School is below the minimum—only black teachers would be entitled to transfer into the school.

---

[3] The Board acknowledged that "racial balance" among its teaching staff had been achieved prior to the inclusion of this provision in the *Bronson* Consent Decree:

> The raical balance policy was favorably received at the midpoint *Bronson* hearing. This provision of the agreement was not targeted as an area of major concern since the majority of schools have remained in compliance.

Superintendent's *Report on Recruitment of Black Teachers and Staff Racial Balance Policy* at 20 (Dec. 11, 1989).

> A transfer out of the school would be approved if the transfer did not cause the school to be out of compliance.

Superintendent's *Report on Recruitment of Black Teachers and Staff Racial Balance Policy* at 17 (Dec. 11, 1989).

This case arose from the application of the Board's racial balance policy against eight individuals. Petitioners King, Cummings, and White are African-American teachers employed by the Board. They were denied the right to transfer from Sands Montessori Elementary School solely because of their race. The Board denied the transfers because their transfer(s) would have resulted in Sands Montessori Elementary School being out of compliance with the Board's racial balance policy. Petitioners King, Cummings, and White were denied the right to transfer even though some of the schools listed on their applications for transfer, i.e., schools to which they sought transfer, were in "need" of African-American teachers to bring them into compliance with the Board's racial balance policy. Effron testified that African-American Montessori teachers like King, Cummings, and White would never be allowed to transfer until other comparably trained African-American teachers are found to replace them.

Petitioners Retic and Rosser, African-American teachers employed by the Board, were denied the right to transfer from Carson Montessori Elementary School solely because of their race. Retic and Rosser requested transfers when Carson was converted from a neighborhood school into a Montessori school because they were not Montessori trained. The Board denied the transfers because their transfer(s) would have resulted in Carson Montessori Elementary School being out of compliance with the Board's racial balance policy. The Board adhered to its racial balance policy even though Retic and Rosser were not Montessori trained.

Petitioner Montgomery is an African-American teacher employed by the Board. She was denied the right to transfer from Roberts Paideia School. The Board denied the transfer because her transfer would have resulted in Roberts Paideia School being out of compliance with the Board's racial balance policy.

Petitioners Jacobson and Young are white teachers employed by the Board. They were assigned to the Carson Montessori Elementary School as physical education and music teachers respectively. In 1990, both were transferred from Carson to other schools and replaced by African-American teachers solely on account of their race to bring Carson into compliance with the Board's racial balance policy. Because such gym and music "specialist" teachers need not be Montessori trained, the Board transferred Jacobson and White from Carson and replaced with non-Montessori trained African-American teachers to bring Carson into compliance with the racial balance policy. Young's new assignment requires her to split her time between and commute to two schools.

The Board admitted, and the district court found, that all of these job assignment personnel actions were taken solely on account of petitioners' races, *i.e.*, to comply with the Board's racial balance policy. *Jacobson v. Cincinnati Bd. of Educ.*, No. C-1-90-449, App. at 12a (S.D.Ohio Aug. 16, 1990). The district court also found that Petitioners were irreparably harmed by these actions. *Id.*, App. at 27a.

The Board, as well as the courts below, attempted to characterize the racial balance policy as "specific race neutral:"

> The staff racial balance policy is race conscious generally, but it is *specific race neutral.* It is race conscious in that it can determine the school or schools at which a teacher can teach solely on the basis of his or her race. It is specific race neutral in

> that there is no disparate impact as to race in its application. It is applied equally to both black and white teachers. In some instances, it will benefit or harm white teachers; in others, it will benefit or harm black teachers.

Jacobson v. Cincinnati Bd. of Educ., No. C-1-90-449, App. at 11a-12a (S.D.Ohio Aug. 16, 1990). See also *Jacobson v. Cincinnati Bd. of Educ.*, 961 F.2d at 102, App. at 4a (6th Cir. 1992).

Even a cursory analysis of the above facts, however, indicates that the policy is not "specific race neutral." Because there is a "shortage" of Montessori trained African-American teachers within the Cincinnati Public Schools, the racial balance policy, as applied, locks African-American teachers into assignments at Montessori schools, and it in effect prohibits white teachers from transferring into such schools or results in their involuntary transfer out of such schools. As explained by the Superintendent:

> Since the inception of the policy, there have been instances in which the policy has adversely affected both black and white teachers. For black teachers, this has primarily been at alternative schools which have special training or qualifications attached to the position. A case in point is made at Sands where it has been difficult to locate black Montessori teachers to replace those teachers requesting a transfer. In terms of white teachers, the racial balance policy has had primarily an affect on those individuals who were surplussed from a school by a teacher of the opposite race with less building and system-wide seniority. Both groups may be adversely affected when a teacher is denied a transfer due to the fact that the school is in the posture of accepting only a teacher of one particular race.

Superintendent's *Report on Recruitment of Black Teachers and Staff Racial Balance Policy* at 18 (Dec. 11, 1989). African-American teachers have dropped out of

the Board's Montessori training program to avoid the "racial balance trap" of being locked into Montessori assignments. Indeed, despite the Board's vigorous recruitment of minority teachers, only one African-American teacher in the last three years has agreed to enter into the Montessori training program.

On August 16, 1992, the district court issued its decision denying plaintiffs' request for a preliminary injunction. The court concluded that the Board's racial balance policy was not subject to strict scrutiny mandated by this Court for review of racial classifications in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989). The district court also concluded that the racial balance policy was authorized by the *Bronson* Consent Decree, and was not, therefore, subject to attack. On September 13, 1992, the district court issued an order consolidating the motion for preliminary injunction with final hearing on the merits of the case and entered final judgment in favor of the Respondents.

Petitioners appealed to the United States Court of Appeals for the Sixth Circuit which affirmed. Like the district court, the court of appeals rejected Petitioners' constittuional claims on two bases: (1) the racial balance policy survives an "intermediate level of scrutiny," which is applied rather than "strict scrutiny" because the policy is "specific race neutral;" and (2) the racial balance policy is authorized by the *Bronson* Consent Decree and is, therefore, somehow immunized from attack. It is from this decision that Petitioners seek the review of this Court.[4]

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[4] Petitioners and Plaintiff Cincinnati Federation of Teachers also asserted claims under the applicable collective bargaining agreement with the Board in both the district court and the court of appeals. As noted above both lower courts rejected those claims, and Petitioners do not assert those claims before this Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. INTRODUCTION.

This case involves several substantial issues concerning a public school district's use of a racial classification in the assignment and re-assignment of its teaching staff. The district court and the court of appeals both concluded that such classification was constitutionally permissible under an erroneously selected "intermediate level of scrutiny." Yet this Court's decisions mandate that such a racial classification must be strictly scrutinized. The lower court's refusal to subject the racial balance policy to such strict scrutiny requires reversal.

In addition, this case raises the issue of whether a public school district may adopt a racial quota for the assignment of its teachers in the absence of any evidence suggesting that the Board had in the past discriminated against a particular class of individuals. In this case, the Board adopted its racial balance policy not only in the absence of evidence of prior discrimination against African-Americans, but subsequent to a federal court finding that it had not discriminated in the hiring or assignment of teachers. Under these circumstances, the Board's racial balance policy cannot survive strict scrutiny.

Finally, this case involves the degree of deference which must be accorded a racial classification which is later embodied in a consent decree. In this case, the Board and plaintiffs representing a class of African-American school children included the racial balance policy in the *1984 Bronson* Consent Decree despite the Board's acknowledgement that its teaching staff had been "racially balanced" since at least 1976. The inclusion of the racial balance policy in the *Bronson* Consent Decree, in the absence of any evidence suggesting that it was required to ameliorate the effects of past discrimination, does not immunize the policy from constitutional attack.

II. THE LOWER COURTS ERRONEOUSLY CONCLUDED THAT THE BOARD'S RACIAL BALANCE POLICY WAS "SPECIFIC RACE NEUTRAL" AND WAS, THEREFORE, SUBJECT TO ONLY AN "INTERMEDIATE LEVEL OF SCRUTINY."

Both the district court and the court of appeals found that the Board's racial balance policy was "specific race neutral." Those courts reasoned that although the Board had indeed established a racial classification, that classification was somehow neutral in its application because it adversely affected both African-American and white teachers. The lower courts then concluded that the racial classification imposed by the Board is subject only to an "intermediate level of scrutiny" rather than the "strict scrutiny" traditionally applied by this Court in reviewing racial classification.

These findings are both factually and legally erroneous. As demonstrated by the facts of this case, although it burdens both African-American and white individuals, the Board's racial balance policy does not affect both classes of teachers in the same way. It works to trap African-American teachers in Montessori or other school assignments calling for specialized training. On the other hand, the policy keeps otherwise qualified white teachers from such positions, and, as with Petitioners Jacobson and Young, forces their involuntary transfer from assignments in Montessori schools. The lower courts' conclusion that the Board's racial balance policy was "specific race neutral" is, therefore, factually erroneous.

The primary error of the courts below, however, was their use of a lesser standard of scrutiny to review the racial classification in this case because the racial balance policy was "specific race neutral." In its brief discussion of this issue, quoted here in full, the court of appeals stated:

> Here, the district court found that the policy adopted by the Board is race conscious in the sense

that it allows the Board to determine the schools at which a teacher may teach solely on the basis of his or her race. However, the court went on to find that the policy is "specific race neutral in that there is no disparate impact as to race in its application. It is applied equally to both black and white teachers. In some instances, it will benefit or harm white teachers; in others, it will benefit or harm black teachers." We agree with that characterization. We are therefore unable to agree with plaintiffs' contention that the policy establishes preferences based on race that require us to examine the policy with strict scrutiny to determine whether it conflicts with guarantees afforded them under the Constitution.

Under analogous circumstances, the Court of Appeals for the Third Circuit offered these observations concerning the appropriate level of scrutiny to which such a policy should be subjected:

> No case has suggested that the mere utilization of race as a factor, together with seniority, school need, and subject qualification, is prohibited. Since the classification is not preferential, it might most appropriately be reviewed for its rational relationship to a legitimate government objective, under which standard it would be patently valid. At most, since there is some element of racial classification, albeit not of preference, the appropriate level of scrutiny would be the intermediate level suggested by four members of the Court in *Bakke*, in which the classification was indeed preferential.
>
> The appropriate question under that standard is whether the classification "serve[s] important governmental objectives" and is "substantially related to achievement of those objectives."

Kromnick v. School Dist., 739 F.2d 894 (3d Cir. 1984) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265,359 (1978) (Brennan, White, Marshall & Blackmun, J.J., concurring and dissenting)), *cert. denied*, 469 U.S. 1107 (1985).

> In our view, this intermediate level of scrutiny is the proper one, since the Cincinnati teacher transfer policy, like the policy challenged in *Kromick* [sic], does not prefer one race over another. Accordingly, we must determine whether the policy is substantially related to an important governmental objective.

Jacobson, 961 F.2d at 102-03, App. at 4a-5a.[5]

Contrary to the court of appeals holding in this case, this Court has explicitly held that *all* racial classifications established by governmental entities must be examined with strict scrutiny:

> Decisions by faculties and administrators of public schools based on race or ethnic origin are reviewable under the Fourteenth Amendment. This Court has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

Wygant, 476 U.S. at 273 (plurality opinion) (footnote and citations omitted). See also *Wygant*, 476 U.S. at 285 ("This standard reflects the belief, apparently held by all Members of this Court, that *racial classifications of any sort must be subjected to "strict scrutiny. . . ."*) (O'Connor, J., concurring) (emphasis added) (citations omitted).

The Court reemphasized the application of strict scrutiny to all racial classifications in 1989:

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[5] The court of appeals also noted that the collective bargaining agreement with the Cincinnati Federation of Teachers provided that transfers were to be "consistent with the racial balance of the staff." *Jacobson*, 961 F.2d at 102, App. at 3a. This Court has clearly held, however, that individuals' rights under the Fourteenth Amendment cannot be collectively bargained away. *Wygant*, 476 U.S. at 281 n.8.

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.
>
> Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility. We thus reaffirm the view expressed by the plurality in *Wygant* that *the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.*

City of Richmond v. J.A. Croson Co., 109 S.Ct. at 721 (plurality opinion) (emphasis added) (citations omitted). See also *J.A. Croson Co.*, 109 S.Ct. at 735 ("I agree with much of the Court's opinion, and, in particular, with its conclusion that *strict scrutiny must be applied to all governmental classification by race*, whether or not its asserted purpose is "remedial" or "benign.") (Scalia, J., concurring) (emphasis added); *Michigan Rd. Builders Ass'n v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989).

The Third Circuit's decision in *Kromnick* cited by the court of appeals in this case as support for its application of an intermediate level of scrutiny was decided in 1984, prior to this Court's decisions in *Wygant* and *J.A. Croson Co.* Application of this intermediate level of scrutiny was rejected by this Court in those two cases. Therefore, the court of appeals' reliance upon *Kromnick* is misplaced.

Contrary to the holding of the courts below, this Court has mandated that *all* racial classifications be strictly scrutinized, not just those classifications which result in some sort of a "preference" being awarded to one racial classification over another. Accordingly, the court of appeals erroneously affirmed the district court's application of an intermediate level of scrutiny to the Board's racial balance policy. This Court should, therefore, grant the Petition for a Writ of Certiorari and reverse.

III. THE LOWER COURTS ERRONEOUSLY CONCLUDED THAT THE BOARD'S RACIAL BALANCE POLICY SURVIVES CONSTITUTIONAL ANALYSIS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT; THE POLICY IS NEITHER SUPPORTED BY A COMPELLING STATE INTEREST NOR NARROWLY TAILORED TO FURTHER SUCH INTEREST.

The district court and the court of appeals also erred in their ultimate conclusion that the Board's racial balance policy survives constitutional scrutiny. When analyzed under the proper standard of scrutiny, it is clear that the adoption of the policy was neither supported by a compelling state interest, nor narrowly tailored to further such interest. Accordingly, this Court should grant the instant petition and reverse the decision of the court of appeals.

As noted above, this Court has clearly indicated that all racial classifications must be strictly scrutinized. Such scrutiny contemplates that such racial classifications will be subject to "the most exacting judicial examination." *Wygant*, 476 U.S. at 273 (plurality opinion) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of POWELL, J., joined by WHITE, J.)).

> There are two prongs to this examination. First, any racial classification "must be justified by a compelling governmental interest." Second, the means chosen by

> the State to effectuate its purpose must be "narrowly tailored to the achievement of that goal."

Wygant, 476 U.S. at 274 (plurality opinion) (citations omitted).

In the case at bar, the lower courts erred by not applying this analysis to the Board's racial balance policy. When properly analyzed under this standard, it is clear that the policy is neither justified by a compelling state interest nor narrowly tailored to achieve such interest. Accordingly, the Board's racial balance policy cannot withstand strict scrutiny.

A. The Board's Racial Balance Policy is Not Justified by a Compelling Interest.

This Court has long held that the Constitution forbids "discrimination for its own sake." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 307 (Powell, J.). More recently, this Court has expressly held that "[r]acial balance is not to be achieved for its own sake." *Freeman v. Pitts*, 112 S.Ct. 1430, 1447 (1992). The establishment of a racial classification is permissible, however, only if it is remedial in nature. *Wygant*, 476 U.S. at 277 (plurality opinion).[6] Consequently, the establishment of a racial classification must be supported by findings of past discrimination necessitating such remedial classification. *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. at 723 (plurality opinion) ("[F]or the governmental interest in remedying past discrimination to be triggered "judicial, legislative, or administrative findings of constitutional or

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[6] A state or political subdivision "unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion). A governmental body's labeling of a racial classification as "remedial," however, does not shield such classification from strict judicial scrutiny. *Weinberger v. Wiesenfield*, 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.").

statutory violations' must be made. Only then does the Government have a compelling interest in favoring one race over another.") (citations omitted). See also *Bakke*, 438 U.S. at 307; *Michigan Rd. Builders Ass'n*, 834 F.2d at 589.

In the case at bar, the Board's racial balance policy cannot be justified by the compelling interset of remedying past racial discrimination because the Board never made a finding that it or its administrators had discriminated in the transfer or assignment of its teaching staff. Indeed, when the Board adopted the racial balance policy, the United States Court of Appeals for the Sixth Circuit had just affirmed a lower court's finding that the Board had not so discriminated. *Deal*, 419 F.2d at 1393-94.[7] There was simply no evidence before the Board that it, or its administrators, had ever discriminated in the assignment of either teachers or students.[8]

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[7] Although Respondents herein would have the Court believe that the policy was adopted pursuant to the *Bronson* Consent Decree, it must be emphasized that the policy was adopted in 1974, over ten years before the district court's approval of the Consent Decree.

[8] In this respect, this case is almost identical to the facts before the Court in *Wygant*. In that case, the Court noted that in two prior suits alleging discrimination against African-American teachers in their layoffs, the courts found that the school board had not discriminated. Nevertheless, the board, consistent with its collective bargaining agreement with the teachers' union, began laying off teachers based upon their race rather than their seniority. Given the two prior judicial determinations that the school board had not discriminated, the Court cast serious doubt upon the Board's assertion that the racial classification at issue was compelled by its prior discrimination:

> Despite the fact that Article XII [of the collective bargaining agreement] has spawned years of litigation and three separate lawsuits, no such determination ever has been made. Although its litigation position was different, the Board in *Jackson I* and *Jackson II* denied the existence of prior discriminatory hiring practices. This precise issue was litigated in both those suits. Both courts concluded that any statistical disparities were the result of general societal discrimination, not of prior discrimination by the Board. The Board now con-

Indeed, the district court did not find that the purpose of the racial balance policy was to alleviate the effects of past discrimination. Rather, the district court found that:

> The staff racial balance policy has a number of purposes. One is to further the Board's goal of providing quality integrated education to the children of Cincinnati. Another is to provide varied role models to both black and white students in the Cincinnati Public Schools.

Jacobson v. Cincinnati Bd. of Educ., App. at 14a (S.D. Ohio Aug. 16, 1990). Neither of these purposes can withstand scrutiny.

First, this Court has explicitly rejected the "role model theory," *i.e.*, providing role models for minority children, as supporting the establishment of a racial classification.

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tends that, given another opportunity, it could establish the existence of prior discrimination.

Wygant, 476 U.S. at 278 (plurality opinion). The Court noted that the Board's assertion of prior discrimination was "belated," but left the issue open because it determined that the racially based layoff policy was not narrowly tailored. *Id.*

The Court in *Wygant* did, however, clearly indicate that the school board was not permitted to "admit" prior discrimination in an effort to shield its "remedial" racial classification from review. *Wygant*, 476 U.S. at 278 n.5 (plurality opinion) ("Nor can respondents unilaterally insulate themselves from this key constitutional question by conceding that they have discriminated in the past, now that it is in their interest to make such a concession."). See also *J.A. Croson Co.*, 109 S.Ct. at 725 (plurality opinion) ("A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists."); *Michigan Rd. Builders Ass'n*, 834 F.2d at 590-91 n.7.

The case at bar presents the very issue left open in *Wygant*, *i.e.*, may a school board cleared of racial discrimination by a court thereafter establish a racial classification which it asserts is compelled by its own prior discrimination? This presents a substantial question which this Court should agree to review and answer in the negative.

Wygant, 476 U.S. at 274-276 (plurality opinion). The role model theory, one of the express purposes behind the adoption of the racial balance policy at issue herein, cannot, therefore, serve as the Board's "compelling interest" justifying the policy.[9]

Second, this Court has also rejected the idea that racial balance for racial balance's sake is a "compelling interest" justifying a racial classification. *Bakke*, 438 U.S. at 307. It was undisputed in the courts below that the Board had achieved full racial balance in its teaching staff within two years after the 1974 adoption of its racial balance policy. The Board has nevertheless continued such policy, and even resorted to the coercive enforcement of it, at issue in this case, for nearly twenty years. Clearly, the Board's continued adherence to the racial balance policy is promoting "[r]acial balance . . . for its own sake," *Freeman*, 112 S.Ct. at 1447, a goal this Court has concluded is constitutionally impermissible.

B. The Board's Racial Balance Policy is Not Narrowly Tailored.

Even if the Board's racial balance policy could be considered justified by a compelling state interest, it is clear that the racial balance policy is not "narrowly tailored" to the achievement of that interest. Indeed, the very facts of this case demonstrate the fatal flaw in the application of the policy.

In designing "narrowly tailored" remedial action to ameliorate the effects of past racial discrimination, a governmental actor's classification "must 'fit' with greater precision than any alternative means." *Wygant*, 476 U.S. at 280 n.6 (plurality opinion) (citations omitted). In this regard, the Court in *Wygant* made two observa-

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[9] As noted above, the decision relied upon by the court of appeals in this case, *Kromnick v. School Dist.*, *supra*, erroneously accepted the "role model theory" as legitimate justification for a similar racial balance policy. The *Kromnick* case was decided before *Wygant*.

tions. First, the Court observed that a governmental actor must first consider race-neutral means of achieving its "compelling interest." *J.A. Croson Co.*, 109 S.Ct. at 728. The Court also observed that remedial classifications should not "rest[] upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Id.* Strict quotas "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Id.* The racial balance policy at issue in the case at bar runs contrary to both of these observations.

First, it must be noted that there is absolutely no evidence in the record in this case, or in the record in the *Bronson* case, to suggest that the Board considered race-neutral alternatives to its racial balance policy. Moreover, there is no evidence in the record suggesting that the Board considered discontinuation of this race-based classification after complete "racial integration" had been achieved. The continuation of the racial balance policy for nearly twenty years cannot be considered narrowly tailored when teaching staff racial balance had been achieved within two years of the adoption of the policy. See *Fullilove v. Klutznick*, 448 U.S. 448, 489 (1980) (upholding Congressionally enacted racial classification noting that it was "appropriately limited in extent and duration."); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436 (1976) ("In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished *that* objective. That being the case, the District Court was not entitled to require the [school district] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity.") (emphasis in original). If the Board determined that maintained racial balance was desirable, once such balance had been achieved, the Board should have resorted to race-neutral

means to maintain that balance. It did not, and the continued adherence to the racial balance quota cannot, therefore, be considered narrowly tailored.

Second, as demonsrated by this case, the Board has assumed that African-American and white teachers will choose various teaching specialties in the same proportion. This Court has on several occasions cautioned against this "completely unrealistic" assumption. *J.A. Croson Co.*, 109 S.Ct. 728. See also *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977) (relevant statistical pool for purposes of establishing discriminatory exclusion is the number of minority individuals qualified for particular position); *Johnson v. Transportation Agency*, 480 U.S. 616, 651-52 (1987) (O'Connor, J., concurring) (same).

In the case at bar, it is clear that African-American teachers in the Cincinnati Public Schools have not chosen Montessori training in the same proportion as white teachers. Indeed, only one African-American has entered the Board's Montessori training program in the last three years.[10]

Nevertheless, the Board has required the staffs of its Montessori schools to reflect the same racial balance as the other schools with the district. Accordingly, African-American teachers are "trapped" into particular assignments at Montessori schools, not even being permitted to transfer from one Montessori school to another, simply because their transfer would throw the school to which they are currently assigned out of racial balance. On the other hand, white teachers who are not Montessori trained have been involuntarily transferred from non-Montessori positions at Montessori schools merely because

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[10] As noted above, the lack of African-Americans entering into the Board's Montessori training program is due in large part to the very maintenance of the raical balance policy. African-American teachers simply do not want to become trapped into Montessori school assignments.

non-Montessori trained African-American teachers can be transferred in to bring the school into racial balance. This is simply "outright racial balancing" which cannot be tolerated. *J.A. Croson Co.*, 109 S.Ct. at 728 (plurality opinion). The Board's racial balance policy cannot, therefore, be considered narrowly tailored. Accordingly, it does not survive strict scrutiny and should be declared in violation of the Fourteenth Amendment.

IV. THE *BRONSON* CONSENT DECREE CANNOT SERVE AS A SHIELD AGAINST JUDICIAL SCRUTINY OF THE BOARD'S RACIAL BALANCE POLICY.

In its decision, the district court noted that the Board's racial balance policy was incorporated into the *Bronson* Consent Decree and that the racial integration of a school system's teaching staff is a permissible means of dismantling a "dual school system." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).[11] Accordingly, the district court reasoned, the racial balance policy was authorized by the *Bronson* Consent Decree.

It is undisputed that parties to a school desegregation action are permitted to settle the case through a consent decree, see, e.g., *Freeman*, 112 S.Ct. 1430, and that the racially based assignment of teachers is permissible as part of a remedy to dismantle a "dual" school system. See, e.g., *Swann, supra*; *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 1670 (1969); *Davis v. Board of Educ.*, 402 U.S. 33 (1971). This Court has, however, clearly defined the limitations upon federal court decrees particularly when challenged by adversely affected third parties:

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[11] "[I]t is a mistake to treat words such as 'dual' and 'unitary' as if they were actually found in the Constitution. * * * Courts have used the terms 'dual' to denote a school system which has engaged in intentional segregation of students by race, and 'unitary' to describe a school system which has been brought into compliance with the command of the Constitution." *Board of Educ. v. Dowell*, 111 S.Ct. 630, 636 (1991).

> In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to "the *condition* alleged to offend the Constitution. . . ." Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.
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> * * * *
>
> The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . . .

Milliken v. Bradley, 433 U.S. 267, 280-82 (1977) (citations and footnote omitted) (emphasis in original). See also *Dowell*, 111 S.Ct. at 637; *Freeman*, 112 S.Ct. at 1445.

In the case at bar, it is clear that the *Bronson* Consent Decree cannot serve as justification for the Board's use of coercive means to enforce its racial balance policy. The Sixth Circuit in *Deal* found that the Board had not discriminated in the assignment of teachers. The Board, nevertheless, thereafter adopted the racial balance policy at issue herein. The Board achieved the racial balance of its staff under the policy no later than 1976.

The policy was not included in the *Bronson* Consent Decree until 1984, ten years after its adoption and well after racial balance had been achieved. It is "aimed at eliminating a condition that does not violate the Consti-

tution . . . ." *Milliken*, 433 U.S. at 282. Therefore, the inclusion of the racial balance policy in the *Bronson* Consent Decree cannot immunize the Board's use of a racial classification in the assignment of teachers when challenged by adversely affected teachers under the Fourteenth Amendment.

As noted above, the Board's agreement to incorporate the policy into the *Bronson* Consent Decree was designed not to correct constitutionally invalid racial imbalance, but rather to maintain the racial balance that had already been achieved. The *Bronson* court's inclusion of the provision into the consent decree therefore exceeded the scope of permissible remedies. *Pasadena City Bd. of Educ.*, 427 U.S. at 436. Accordingly, the inclusion of the racial balance policy into the consent decree cannot shield it from judicial scrutiny and justify its maintenance. The lower courts' holding to the contrary, this Court should grant the instant petition and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

CONCLUSION

For the reasons stated, Petitioners respectfully request this Court to grant the Petition for A Writ of Certiorari, and to reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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DATED: June 24, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 90-3739/3840

BEA JACOBSON; THIRILEEN KING; BONITA WHITE; CLARICE CUMMINGS; MARTHA RETIC; MARILYN ROSSER; LINDA YOUNG; ROSA MONTGOMERY; CINCINNATI FEDERATION OF TEACHERS,

Plaintiffs-Appellants,

v.

CINCINNATI BOARD OF EDUCATION; LEE ETTA POWELL,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio

Decided and Filed March 31, 1992

Before: KENNEDY and NORRIS, Circuit Judges; and MILES, Senior District Judge.*

ALAN E. NORRIS, Circuit Judge. Eight Cincinnati public school teacher and the Cincinnati Federation of Teachers ("CFT"), the union that represents them,

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* The Honorable Wendell A. Miles, Senior United States District Judge for the Western District of Michigan, sitting by designation.

brought suit in the district court challenging the teacher transfer policy adopted by the Cincinnati Board of Education ("Board") to ensure that the faculty of its schools reflects system-wide racial balance. After an evidentiary hearing, the district court concluded that the policy did not violate either plaintiffs' Fourteenth Amendment right to equal protection or the terms of the collective bargaining agreement ("CBA") negotiated by the CFT and the Board. Accordingly, the district court denied plaintiffs' request to enjoin the transfer policy. For the reasons outlined below, we affirm the judgment of the district court.

This dispute has its genesis in the 1970s, when concerted efforts to eradicate indicia of racial segregation within the Cincinnati public school system began. On January 14, 1974, the Board adopted a policy designed to ensure that the teaching staff of a given school approximated the racial balance of the teaching staff of the system as a whole. Shortly thereafter, the Board issued a statement indicating how this general policy would be implemented. Among other things, the statement provided that the percentage of black teachers in any school should not be five percent greater or less than the percentage of black teachers throughout the system. In order to implement this racial balance, the policy restricts the ability of some teachers to voluntarily transfer to other school buildings, and requires the reassignment of others. It is this portion of the policy which plaintiffs challenge.[1]

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[1] Plaintiffs Bea Jacobson and Linda Young are white teachers at Carson Elementary School, a Montessori alternative which is below the minimum minority standard. They were told that if black teachers could be found to replace them, they would be transferred to another school. Replacements were found and they were informed of their impending transfer. Plaintiffs Martha Retic and Marilyn Rosser are black teachers at Carson who were denied transfers. Plaintiff Rosa Montgomery is a black teacher who was denied a transfer from Roberts Paideia, which is also below the minimum. Plaintiffs Thirileen King, Bonita White and Clarice Cummings are black teachers who were denied transfers from Sands Elementary School, which was below the minimum.

In the same year that these efforts to balance the racial composition of the faculty were initiated, a group of school children and their parents filed a lawsuit against the Board, contending that the school system was unlawfully segregated. That suit was ultimately settled by the parties, and the district court adopted the settlement agreement as a consent decree. *Bronson v. Board of Educ.*, 604 F. Supp. 68 (S.D. Ohio 1984). Paragraph 5 of the settlement agreement reads as follows:

> The Cincinnati Board of Education currently has in force a policy which requires that the staff in each of its schools has a racial composition which is within 5% of the racial composition of the staff in the district as a whole. The Board shall maintain that policy in effect and take steps necessary to assure that it is enforced.

The CFT actively participated in the resolution of *Bronson* and did not object to the maintenance of the staff racial balance policy. The position of the CFT is reflected in the CBA negotiated with the Board. Section 250, paragraph 1, of the CBA contains the following provision regarding teacher transfers: "Teacher requests for transfer will be honored if positions are available and the teacher is qualified for a particular vacancy, provided that the transfer is consistent with the racial balance of the staff."

We begin by noting that school authorities have broad discretion to implement educational policy. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). This authority includes the power to prescribe a ratio of white to minority students that reflects the composition of the overall school district, particularly when such a policy is implemented in order to prepare students for life in a pluralistic society. *Id.* And we believe that this discretionary authority includes the power to assign faculty to achieve a racial ratio reflecting the racial composition of the system's teachers. The

Supreme Court has recognized that the attainment of an integrated teaching staff is a legitimate concern in achieving a school system free of racial discrimination. *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 231-32 (1969).

Here, the district court found that the policy adopted by the Board is race conscious in the sense that it allows the Board to determine the schools at which a teacher may teach solely on the basis of his or her race. However, the court went on to find that the policy is "specific race neutral in that there is no disparate impact as to race in its application. It is applied equally to both black and white teachers. In some instances, it will benefit or harm white teachers; in others, it will benefit or harm black teachers." We agree with that characterization. We are therefore unable to agree with plaintiffs' contention that the policy establishes preferences based on race that require us to examine the policy with strict scrutiny to determine whether it conflicts with guarantees afforded them under the Constitution.

Under analogous circumstances, the Court of Appeals for the Third Circuit offered these observations concerning the appropriate level of scrutiny to which such a policy should be subjected:

> No case has suggested that the mere utilization of race as a factor, together with seniority, school need, and subject qualification, is prohibited. Since the classification is not preferential, it might most appropriately be reviewed for its rational relationship to a legitimate government objective, under which standard it would be patently valid. At most, since there is some element of racial classification, albeit not of preference, the appropriate level of scrutiny would be the intermediate level suggested by four members of the Court in *Bakke*, in which the classification was indeed preferential.

> The appropriate question under that standard is whether the classification "serve[s] important governmental objectives" and is "substantially related of those objectives."

Kromnick v. School Dist., 739 F.2d 894 (3d Cir. 1984) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, White, Marshall & Blackmun, J.J., concurring and dissenting)), *cert. denied.*, 469 U.S. 1107 (1985).

In our view, this intermediate level of scrutiny is the proper one, since the Cincinnati teacher transfer policy, like the policy challenged in *Kromick*, does not prefer one race over another. Accordingly, we must determine whether the policy is substantially related to an important governmental objective. We believe the policy at issue meets that test. It was implemented to achieve a racially integrated faculty throughout the Cincinnati public school system. Not only is this a legitimate objective, it has been endorsed in the past by the CFT. In fact, section 250 of the CBA, which appellants mistakenly contend has been violated by the Board, expressly allows for the accommodation of such a transfer policy.

We therefore hold that plaintiffs have failed to demonstrate how their interest in selecting the schools to which they are assigned outweighs the Board's interest in fostering an integrated, pluralistic school system.

The judgment of the district court is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-90-449

Judge Walter Herbert Rice

BEA JACOBSON, *et al.*,
Plaintiffs,

vs.

CINCINNATI BOARD OF EDUCATION, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW; PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION (DOC. #5) DENIED; CONFERENCE CALL SET TO DETERMINE FURTHER PROCEDURES

[Filed Aug. 16, 1990]

In this case, Plaintiffs, teachers in the Cincinnati public school system and the Union which represents them, seek, among other relief, a preliminary injunction preventing the Defendants, the Cincinnati Board of Education and its superintendent, from enforcing the policy on the racial balance of teachers in the Cincinnati Public Schools. Plaintiffs allege that this policy, as presently implemented by the Defendants, violates the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C.

§ 1983, and the collective bargaining agreement between the Union and the Board.

On July 26, 1990, this Court held an evidentiary hearing on Plaintiffs' request for a preliminary injunction. Based upon the evidence introduced at the hearing,[1] the arguments of counsel, both at the hearing and in their memoranda, the Court hereby enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiffs, Bea Jacobson, Linda Young, Martha Retic, Marilyn Rosser, Rosa Montgomery, Thirileen King, Bonita White and Clarice Cummings are employed by the Defendant Cincinnati Board of Education as teachers in the Cincinnati Public Schools.

2. Plaintiff Cincinnati Federation of Teachers ("CFT") is the collective bargaining representative for all full-time teachers employed by the Cincinnati Board of Education, including the individual Plaintiffs listed above.

3. Defendant Cincinnati Board of Education ("Board") is a body of elected officials which operates and sets policy for the Cincinnati Public Schools. Defendant Dr. Lee Etta Powell is the Superintendent of the Cincinnati Public Schools, charged with the administration of the Cincinnati Public Schools including the assignment of teachers.

4. On January 14, 1974, the Board adopted a policy regarding the racial balance of teachers in the Cincinnati Public Schools. This policy was designed to insure that the teaching staff at a given school approximated the racial balance of the teaching staff for the school system as a whole. The policy provided:

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[1] In addition to the testimony and exhibits introduced at the hearing, the Court has considered the transcript of arbitration proceedings between the union and the board and the decision of the arbitrator in that arbitration.

Voluntary efforts are now underway for the balancing of teaching staffs in each school to approximate the racial balance of the teaching staff in the entire district. These voluntary efforts should be continued. However, if they do not achieve a balance in each school approximating the balance of the system as a whole, then the Superintendent is directed mandatorily to assign teachers on such a basis that each school, commencing September 1, 1974, will have a racial balance of teachers substantially approximating the balance of the teaching staff as a whole.

5. On March 11, 1974, the Board adopted a statement which clarified the policy it had adopted the preceding January. The statement clarified the policy in the following manner:

a. the percentage of black teachers in any school should not be 5% more than or 5% less than the percentage of black teachers in the system as a whole;[2]

b. the policy has nothing to do with the hiring of new teachers [nor, as it has been implemented, does the policy have any application to the promotion or firing of teachers];

c. the policy would be implemented initially through voluntary teacher transfers and the assignment of newly hired teachers; and

d. after June 1, 1974 and subject to the limitation that no more than 20% of the teaching staff at any school would be transferred in any year, the policy would be implemented through mandatory teacher transfers.

6. Since its adoption and clarification, the Board's policy on racial balance has continuously been in effect.

7. Since the mid 1970's the Board and the CFT have negotiated collective bargaining agreements which govern

[2] Two percentages are used in applying the policy, one for elementary schools and one for secondary schools.

the terms and conditions, including the right to request and receive a transfer from one school to another, of employment for teachers.

8. The current collective bargaining agreement contains a provision (§ 250, ¶ 1) which governs teacher requests for transfers. In part, that provision reads, "[t]eacher requests for transfer will be honored if positions are available and the teacher is qualified for a particular vacancy, provided that the transfer is consistent with the racial balance of the staff." The proviso in the quoted provision means that the transfer cannot violate the staff racial balance policy.

9. Every contract negotiated by the CFT and the Board that has had a provision giving teachers the right to request a transfer has had a proviso similar to that quoted in Finding of Fact No. 8.[3]

10. In May, 1974, a group of Cincinnati schoolchildren and their parents filed a lawsuit against the Board, alleging that the Board was maintaining a dual, segregated school system. *Bronson v. Board of Education*, Case No. C-1-74-205 ("*Bronson*"). Ultimately, that lawsuit was resolved when this Court adopted the settlement agreement, which the Board and the *Bronson* Plaintiffs had negotiated, into a consent decree. *Bronson v. Board of Education*, 604 F. Supp. 68, 82 (S.D. Ohio 1984). Paragraph 5 of the settlement agreement, which is part of this consent decree, requires that the Board maintain its policy on staff racial balance. Paragraph 5 reads:

> The Cincinnati Board of Education currently has in force a policy which requires that the staff in each of its schools has a racial composition which is within 5% of the racial composition of the staff in the dis-

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[3] Prior to the adoption of voluntary transfer provisions such as that contained in § 250, ¶ 1, of the current contract, whether a teacher's requested transfer would be granted was in the sole discretion of the Board and its superintendent.

> trict as a whole. The Board shall maintain that policy in effect and take steps necessary to assure that it is enforced.

With the adoption of paragraph 5 of the settlement agreement into this Court's consent decree, the Board's voluntary staff racial balance policy became an order of this Court. Furthermore, the Board is required by order of this Court to take necessary steps to assure that the policy is enforced.

11. After the parties in *Bronson* agreed to settle that case, and before this Court adopted their settlement agreement into a consent decree, the Court invited all interested persons to comment on the settlement agreement both in writing and by testifying at the fairness hearing the Court conducted to determine whether to adopt the settlement agreement as a consent decree. The CFT testified at the fairness hearing and filed a brief, "commenting on the proposed settlement" (Doc. #716). In both testimony and in the brief, the CFT addressed Paragraph 5. However, the CTF did not object to the maintenance of the staff racial balance policy in either. On the contrary, the CFT recommended that the policy be expanded to include school administrators. Additionally, the CFT suggested that Paragraph 5 be amended to address the need for stability in teacher assignments and to state explicitly that nothing in the agreement should require the transfer of any teacher, except where necessary to comply with the staff racial balance policy.

12. As currently implemented by the Defendants, the staff racial balance policy limits the ability of teachers to exercise their rights to transfer in two ways.

First, it can limit the schools into which a teacher can transfer. For instance, a black teacher would be denied a transfer into a school that was already above the maximum percentage for black teachers, that is, a school whose percentage of black teachers is already more

than 5% greater than the percentage of black teachers in the system as a whole. A white teacher would be denied a transfer into a school that was already below the minimum for black teachers, that is, a school whose percentage of black teachers is already more than 5% less than the percentage of black teachers in the system as a whole.

Second, the policy can limit the ability of a teacher to leave his or her present school. A teacher will not be allowed to leave his or her present school if the transfer would cause his or her present school to become out of compliance with the policy or if the school is already out of compliance.

13. The implementation by the Defendants of the staff racial balance policy also allows for the involuntary transfer of teachers from one school to another. In doing so, the implementation of the policy is authorized by § 250, ¶ 7 of the collective bargaining agreement between the Board and the CFT. Paragraph 7 states that a teacher receiving an administrative/involuntary transfer shall receive the reasons in writing. Plaintiffs' assertion to the contrary notwithstanding, the Defendants may involuntarily transfer a teacher for reasons other than disciplinary reasons. In particular, a teacher may be involuntarily transferred to implement the staff racial balance policy.

14. The staff racial balance policy does *not* affect the hiring, discharge, salary or promotion of any teacher. For instance, a teacher would not be denied a promotion even if the promotion caused him or her to change schools and, thereby, caused one or the other or both of the schools to become out of compliance or even further out of compliance with the policy.

15. The staff racial balance policy is race conscious generally, but it is *specific race neutral.* It is race con-

scious in that it can determine the school or schools at which a teacher can teach solely on the basis of his or her race. It is specific race neutral in that there is no disparate impact as to race in its application. It is applied equally to both black and white teachers. In some instances, it will benefit or harm white teachers; in others, it will benefit or harm black teachers.

16. The individual Plaintiffs have either been denied requested transfers or have been involuntarily transferred by the Defendants. In each instance, the only reason for the Defendants' action was to implement the staff racial balance policy.

17. Plaintiffs Bea Jacobson and Linda Young are white teachers at Carson Elementary School. The Defendants have told Jacobson and Young that they will be involuntarily transferred from Carson for the 1990-1991 school year because the school is below the minimum for black teachers.[4] Jacobson and Young will be replaced with black teachers.

18. Plaintiffs Martha Retic and Marilyn Rosser are black teachers at Carson. Each of them sought to transfer from Carson for the 1990-1991 school year. Their requests were denied because at the time the requests were made, Carson was below the minimum for black teachers.

19. Plaintiff Rosa Montgomery is a black teacher at Roberts Paideia School. She sought to transfer from Roberts Paideia for the 1990-1991 school year. The Defendants denied her request because at the time Roberts Paideia was not in compliance with the staff racial balance policy. Roberts Paideia was below the minimum for black teachers.[5]

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[4] Carson was out of compliance with the staff racial balance policy for the 1988-1989 and 1989-1990 school years.

[5] Roberts Paideia was below the minimum for black teachers for the 1988-1989 and 1989-1990 school years.

20. Plaintiffs Thirileen King, Bonita White and Clarice Cummings are black teachers at Sands Elementary School. King and Cummings requested transfers from Sands in prior years, but did not seek transfers for the 1990-1991 school year. White requested a transfer from Sands for the 1990-1991 school year. Each was denied the requested transfer because at the time of each request, Sands was not in compliance with the staff racial balance policy. Sands was below the minimum for black teachers.[6]

21. In sum, Plaintiffs Retic, Rosser, Montgomery, King, Cummings and White were not allowed to leave their schools because at the time they requested transfers, their schools were not in compliance with the staff racial balance policy.

22. Allowing Plaintiffs Retic, Rosser, Montgomery, King, Cummings and White to leave their schools would have violated the staff racial balance policy as implemented by the Defendants. The implementation of the policy prevents a teacher from leaving his or her school when the teacher's departure will cause the school to become out of compliance with the policy, or when the school is already out of compliance with the policy. When these Plaintiffs requested transfers, their schools were already out of compliance with the policy. Hence, the departure of any of these Plaintiffs from her school would have violated the Defendants' implementation of the policy by causing their schools to be further out of compliance with the policy.

23. Section 120 of the collective bargaining agreement provides that the Board shall not discriminate against any person on the basis of race. The staff racial balance policy *does* discriminate against teachers on the basis of

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[6] Sands was below the minimum for black teachers for the 1987-1988, 1988-1989 and 1989-1990 school years.

their race, by determining, largely if not solely on the basis of that teacher's race, whether a given teacher's request to transfer should be granted or denied or whether a given teacher shoud be involuntarily transferred. However, the staff racial balance policy does *not* violate § 120 of the collective bargaining agreement. Section 120 must be read together with and in the context of the entirety of the collective bargaining agreement, and in connection with the parties' understanding about the methods by which the staff racial balance policy would be implemented. When so read, it is apparent that the prohibition against discrimination against any person on the basis of race, set forth in § 120, is modified or limited by the teacher transfer rights provided for by § 250, ¶ 1 of the agreement. That latter section clearly provides that teacher transfer rights are explicitly limited by the staff racial balance policy. In other words, the collective bargaining agreement recognizes that teacher transfer rights may be limited by racial considerations. The parties have always understood that the staff racial balance policy would be implemented with race conscious methods, such as involuntary teacher transfers. Accordingly, in the area of voluntary or involuntary teacher transfers, § 120 of the collective bargaining agreement is modified by the staff racial balance policy. The Defendants may discriminate on the basis of race to implement that policy and, as will be more fully set forth below, such discrimination is both factually supportable and legally permissible. Actions, even actions that discriminate on the basis of race, that do not violate § 250, ¶ 1 of the collective bargaining agreement, cannot and do not violate § 120 of that agreement.

24. The staff racial balance policy has a number of purposes. One is to further the Board's goal of providing quality integrated education to the children of Cincinnati. Another is to provide varied role models to both black and white students in the Cincinnati Public Schools.

25. The CFT bargained to secure the right for teachers to request and to receive transfers, which right is contained in § 250, ¶ 1, of the collective bargaining agreement. This right is an important one. Prior to the adoption of the right, a teacher's principal could prevent a transfer. It gives teachers more control over their personal and professional lives. The right to transfer allows teachers to request and receive transfers for "personal" reasons, such as the convenience of the location of a certain school. It also allows teachers to take advantage of career enrichment opportunities such as teaching in a building whose physical characteristics are more conducive to teaching a given program.

26. The CFT did not object to the Defendants' implementation of the staff racial balance policy until it sensed that the manner in which it is implemented had changed. In particular, the CFT concluded that the policy's implementation had changed so that it would involve the involuntary transfer of teachers and the denial of requested transfers when the school the teacher sought to leave was *already* out of compliance and not merely when that teachers departure would *cause* his or her school to become out of compliance in the first instance.

27. Over the years, approximately 60% of the teachers, who have requested transfers under the right to do so secured to them by collective bargaining have received those transfers. There was no evidence before the Court as to what portion of the approximately 40% who did not receive transfers failed to do so because of the Defendants' implementation of the staff racial balance policy.

OPINION

In this case, Plaintiffs challenge two methods by which the Defendants implement the staff racial balance policy.[7]

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[7] Plaintiffs do not argue, for instance, that implementing the policy by the initial placement of newly hired teachers violates the

The Plaintiffs argue that the involuntary transfer of some teachers and the denial of other teachers' requested transfers, because their schools were already out of compliance with the policy, violate the collective bargaining agreement, 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment.[8] Initially, the Court will discuss the collective bargaining agreement, and then it will discuss § 1983 and the Equal Protection Clause of the Fourteenth Amendment.

The Plaintiffs assert that the challenged practices violate § 120 of the collective bargaining agreement; that the involuntary transfer of some teachers violates the collective bargaining agreement because they are not sanc-

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Fourteenth Amendment. Thus, although the challenge to the policy's implementation herein is a narrow one, the Court is unable to divine any principled reason for distinguishing between the different methods by which the policy is implemented. In addressing a similar situation, one Court commented:

> [T]here is an innate inconsistency in plaintiffs' position on this issue. Plaintiffs do not challenge the constitutionality of the school district's policy to assign teachers initially to schools in such manner as will integrate the school's faculty. Furthermore, they do not suggest that the policy limiting voluntary transfer on race considerations is constitutionally offensive. They suggest no basis, grounded in constitutional principles, why involuntary transfer of teachers, unlike these other unchallenged race-conscious strategies, involves a constitutional discrimination in the absence of a contractual right that is being overridden.

Kromnick v. School District of Philadelphia, 739 F.2d 894, 903 (3d Cir. 1984). In other words, a finding that the challenged methods violate the Fourteenth Amendment would in all likelihood result in a finding that the policy in *all* manner of implementation is unconstitutional.

[8] In their amended complaint, Plaintiffs alleged that the challenged practices also violated 42 U.S.C. §§ 1981 and 1985. However, Plaintiffs did not argue these sections at the hearing or in their subsequent memoranda. Consequently, the Court will not discuss them further other than to say that the challenged practices do not offend either statutory provision.

tioned by § 250, ¶¶ 7 and 8 of the collective bargaining agreement; and that the denial of other teachers' requested transfers because their present schools were already not in compliance with the staff racial balance policy violates § 250, ¶ 1 of the collective bargaining agreement. The Court will discuss these contentions in the above order.

Section 120 of the collective bargaining agreement prevents the Board from discriminating against any teacher on the basis of race. The Plaintiffs argue that the implementation of the staff racial balance policy violates § 120 because it allows for the assignment of teachers, whether through involuntary transfers or the denial of requested transfers, on the basis of their race. Without question, the staff racial balance policy is race conscious, in the sense that the policy itself and decisions on its implementation revolve around the issue of the race of a given teacher or group of teachers. As the policy is race conscious, its implementation must be race conscious. Indeed, the school at which each of the individual Plaintiffs will teach during the 1990-1991 school year has been determined on the basis of her race.

However, this does not mean that the policy and its implementation violate § 120. Section 120 must be read in conjunction with the rest of the agreement and with the parties understanding of how the Defendants had been implementing and would continue to implement the staff racial balance policy. The collective bargaining agreement recognizes the existence of the staff racial balance policy. That policy is a specific limitation on a teacher's right to transfer. Therefore, the implementation of the policy with respect to teacher transfer rights cannot violate § 120. It is apparent that the prohibition against discrimination against any person on the basis of race, set forth in § 120, is modified or limited by the teacher transfer rights provided for by § 250, ¶ 1 of the agreement. That latter section clearly provides that

teacher transfer rights are explicitly limited by the staff racial balance policy. In other words, the collective bargaining agreement recognizes that teacher transfer rights may be limited by racial considerations. The parties have always understood that the staff racial balance policy would be implemented with race conscious methods, such as involuntary teacher transfers. Accordingly, in the area of teacher transfers, § 120 of the collective bargaining agreement is modified by the staff racial balance policy. That the policy would be implemented through involuntary teacher transfers has been recognized since its inception. The CFT approved of this fact in its presentations before this Court in connection with the adoption of a consent decree in *Bronson*. Therefore because the CFT and the Board have always recognized that involuntary teacher transfers (as well as the granting or denial of requests to transfer) would be used to implement the policy, their use does not violate § 120.

Accordingly, the Court concludes that neither of the challenged methods by which the Defendants implement the staff racial balance policy (involuntary transfers and the denial of requests to transfer) violates § 120 of the collective bargaining agreement.[9]

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[9] Even if the Court were to conclude that the implementation of the staff racial balance policy violates § 120, such a finding would not be a basis for granting Plaintiffs the relief they request. To accept Plaintiffs argument regarding the application of § 120 to the staff racial balance policy would require the Court to conclude that the Board has bargained away all power to implement the policy. Under the *Bronson* consent decree, the Board is not free to do this.

The predicate for Plaintiffs' argument that the challenged practices violate § 120 is that the challenged practices are race conscious. Without question, both of the challenged methods by which the Board implements the policy are race conscious, although they are specific race neutral. The *policy* itself is race conscious, yet specific race neutral. Therefore, all methods by which it is *implemented* must similarly be race conscious. If the challenged methods of implementation violate § 120, then *any* method of implementation, such as the initial assignment of newly hired teachers, similarly violates

Plaintiffs argue that the involuntary transfers of Plaintiffs Jacobson and Young will violate the collective bargaining agreement because the use of involuntary transfers in such a manner are not authorized by that agreement. In particular, the Plaintiffs argue that the use of involuntary transfers under § 250, ¶ 7, is limited to disciplinary transfers. Since the procedures set forth in § 210, ¶ 2, were not followed before either Jacobson or Young was told of the impending transfer, Plaintiffs contend that there can no involuntary transfer.

The Court disagrees. As is set forth in Finding of Fact No. 13, § 250, ¶ 7, is broader than the Plaintiffs contend. It is permissible to transfer a teacher under this paragraph in order to implement the staff racial balance policy. Accordingly, the Court concludes that the involuntary transfers of Plaintiffs Jacobson and Young will not violate the collective bargaining agreement.[10]

Plaintiffs argue that the denial of the requested transfers of Plaintiffs Retic, Rosser, Montgomery, King, White and Cummings violated § 250, ¶ 1, of the collective bargaining agreement. The Plaintiffs contend that the limitation of teacher transfer rights, contained in that para-

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§ 120. The staff racial balance policy is no longer a voluntary Board policy. It became an order of this Court with the adoption of the *Bronson* consent decree. Under the consent decree, the Board is required to maintain the policy and to take steps to assure that it is enforced. The Board is not free to relinquish, in a collective bargaining agreement, all power and discretion to take steps to assure that the policy is enforced, without running a real risk of jeopardizing its (the Board's) ability to comply with the mandate of the *Bronson* decision. This is not to say that the CFT and the Board may not collectively bargain with respect to the manner in which the policy is implemented. In this regard, please see the Court's Closing Remarks.

[10] Having decided that § 250, ¶ 7, countenances the transfers, the Court finds it unnecessary to address Plaintiffs' contention that the transfers are not authorized by § 250, ¶ 8, which deals with transfers when there is a surplus of teachers at any school.

graph, does not extend to situations where the school a teacher seeks to leave is already out of compliance with the staff racial balance policy, and the teacher's departure merely causes the school to be more out of compliance.

The Court agrees with Plaintiffs' factual predicate. When Plaintiffs Retic, Rosser, Montgomery, King, White and Cummings sought their transfers, their schools were already out of compliance with the policy. While allowing these Plaintiffs to transfer would have caused their schools to be more out of compliance, it would not have caused any of the schools *to become* out of compliance in the first instance. However, the Court does not agree that the implementation of the policy in this manner violates the collective bargaining agreement.

The staff racial balance policy, as included in the *Bronson* consent decree and in the collective bargaining agreement, requires the percentage of black teachers at any school to be within five percent, plus or minus, of the percentage of black teachers in the system as a whole. The staff racial balance policy is *not* the plus or minus five percent ratio along with delineation of the specific means of its implementation. The Board is required to maintain that policy. However, it has the discretion to choose the manner in which the policy will be implemented, as long as it, "takes steps necessary to assure that [the policy] is enforced." *Bronson* consent decree at ¶ 5. Providing the Board with this discretion is fully consistent with the underlying philosophy of the *Bronson* consent decree. In settling *Bronson*, the Board bargained for and received great flexibility. The consent decree requires the Board to meet specific goals within a specific time. However, the Board retains broad discretion in choosing the manner in which it will meet those goals.

In the absence of a limitation of the Board's discretion explicitly written into the collective bargaining agree-

ment, the Court is unwilling to imply one.[11] As long as the means of implementation, chosen by the Defendants, will further the staff racial balance policy[12] and those means are not explicitly precluded by the collective bargaining agreement, the means selected by the Defendants do not violate § 250, ¶ 1, of that agreement.

Herein, the denial of requested transfers will further the staff racial balance policy. By denying the requested transfers, the Defendants are able to prevent the schools, which the affected Plaintiffs seek to leave, from falling further out of compliance. If the Defendants did not have the ability to stem the flow of teachers from a school that was not in compliance, it would impact on the Board's ability to carry out the mandate of the *Bronson* consent decree. Additionally, the means chosen are not explicitly forbidden by the collective bargaining agreement.

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[11] The reason that any limitation on the Board's power to implement the staff racial balance policy must be explicitly stated is basic. The *Bronson* Plaintiffs bargained for two components with respect to the staff racial balance policy. *First*, the policy shall be maintained. *Second*, the Board shall take steps to assure that it is enforced. If the Board were to relinquish, implicitly rather than explicitly, the ability to implement (in other words to enforce) the policy, then the *Bronson* Plaintiffs would have little opportunity to assure themselves that the Board is taking steps to enforce the policy. An explicit relinquishment would at least give the Plaintiffs notice of same and, therefore, the opportunity to petition this Court for relief under its continuing jurisdiction over the *Bronson* consent decree.

[12] The means chosen must further the staff racial balance policy because the teacher transfer rights are limited only by that policy. The staff racial balance policy requires that all schools have a percentage of black teachers which is within five percent, plus or minus, of the system as a whole. The denial of the requested transfers will further the policy by preventing certain schools from falling further out of compliance with the policy, thus, making it more difficult for the Board to comply with the *Bronson* mandate.

Accordingly, the Court concludes that there is no violation of § 250, ¶ 1, of the collective bargaining agreement by implementing the staff racial balance policy in a manner which prevents a teacher from exercising his or her transfer rights when the school he or she seeks to leave is already out of compliance with the policy and the teacher's departure will merely cause that school to be even more out of compliance.[13] This is not to say that

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[13] There is some evidence before the Court which might suggest that the Defendants have stated their intention to implement the policy in a manner which would deny requested transfers *only* when a teacher's departure would *cause* the school he or she seeks to leave to become out of compliance in the first instance, as opposed to denying a requested transfer when the transfer would merely exacerbate an already existing state of non-compliance. Accordingly, the argument could be made that to deny a teacher's request to transfer from a school *already* in a state of non-compliance violates the Board's own policy. *See* CFT Exhibit 29. However, the Court is unwilling to conclude from this evidence that the Board's discretion has been so limited, and as a consequence, that there has been a violation of the collective bargaining agreement by denying transfers from schools already out of compliance. First, to do so would be an implicit limitation the Defendants' discretion in a manner that would deny the *Bronson* Plaintiffs the ability to assure themselves the that the policy is being enforced. Second, it is clear that the Defendants implemented the policy in the manner under question both before and after exhibit 29 was drafted.

Furthermore, the Defendants can change the manner in which the policy is implemented because there is no limitation on their discretion to choose the means of implementation in either the collective bargaining agreement or the *Bronson* consent decree. The *Bronson* consent decree requires the Board to maintain the policy. The Board bargained for and received the right to use its discretion in implementing this and other requirements of the consent decree. In the absence of an explicit statement in the collective bargaining agreement that a particular method of implementation is forbidden, the Court is unwilling to limit the discretion that the Board bargained for in the *Bronson* consent decree. Thus, even assuming, *arguendo*, that exhibit 29 evidences a change in the means of implementing the policy, the Defendants were free to do so. The policy, without limitation, is plus or minus 5 percent, not plus or minus 5 percent *and* a specific means or method of implementing or guaranteeing that the required ratios are met.

the manner in which the Defendants implement the policy is immutable. Rather, any limitation on the Board's discretion in implementing the policy must be explicit, and any such limitation must not deprive the Defendants of the power to take steps necessary to assure that the policy is enforced, as required by the *Bronson* consent decree. In this regard, please see the Court's Closing Remarks.

Having concluded that the contested practices do not violate the collective bargaining agreement, the Court turns its attention to Plaintiffs' constitutional argument. Plaintiffs contend that the Defendants' implementation of the staff racial balance policy, by the challenged practices, violates the Equal Protection Clause of the Fourteenth Amendment.[14]

In resolving this question, one must be mindful of certain factors regarding the staff racial balance policy. First, its purpose is to further the Board's goals of providing quality integrated education and of providing varied role models for all children in the Cincinnati Public Schools. Second, the policy does not discriminate, on the basis of race, in the hiring, firing or promotion of any teacher. Third, the policy is an order of this Court under a consent decree whose purpose was the elimination of racial isolation in the Cincinnati Public Schools. With these factors in mind, the Court turns to the proper constitutional analysis.

It has long been the law that a court may use race conscious means of assigning faculty as part of a remedy in dismantling a dual school system. *See e.g., United*

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[14] The Plaintiffs also contend that the policy violates 42 U.S.C. § 1983. In the present context, § 1983 is nothing more than a procedural mechanism by which Plaintiffs' constitutional challenge may be presented. If the Court should conclude that the policy, as implemented by the challenged practice, violates the Fourteenth Amendment, then it similarly violates § 1983. The opposite is also true. Therefore, the Court will not independently discuss Plaintiffs' § 1983 claim.

States v. Montgomery County Board of Education, 395 U.S. 225 (1969). *See also, Columbus Board of Education v. Penick*, 443 U.S. 449, 467 (1979) (Stating that policy of assigning black teachers to black schools and white teachers to white schools would deprive students of both races the opportunity of being taught by teachers of both races and would serve as racial identification of schools). In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Court rejected the argument that the Constitution requires the assignment of teachers on a "color blind" basis so that race conscious faculty assignments could not be used as part of the remedy to dismantle a dual school system. 402 U.S. at 19. Thus, in order to create a unitary system, it was permissible to require that faculty assignments be made on the basis of their race and in specific ratios. *Id.* at 19-20; *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33, 35 (1971).

Based upon the command of *Swann*, the Court concludes that because the staff racial balance policy is required as part of a consent decree [15] ordered to resolve a

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[15] Although not specifically referring to *Swann*, Plaintiffs argue that the policy is somehow less enforceable because it was entered as part of a consent decree and not after a finding of liability against the Board for having operated (either *de jure* or *de facto*) a dual school system. This is simply not the case. *Swann* and its progeny allow for the racially-balanced assignment and transfer of teachers by means of a plan such as the one under consideration without either a finding of past discrimination in the assignment of and transfer of teachers or a narrowly-tailored remedy to address that discrimination. This is true even if there has been no prior finding of a dual school system, either *de jure* or *de facto*. This Court is aware of no authority which would suggest that school desegregation cases may not be voluntarily resolved. On the contrary, that type of lawsuit which has the potential of polarizing a community is most appropriately resolved through a voluntary settlement which is enforced through a consent decree. Therefore, the staff racial balance policy is enforceable even though it is part of a consent decree. This is particularly true here where the Plaintiffs supported the adoption of the challenged policy into the consent decree. Similarly, the Court rejects Plaintiffs' argument that the Sixth

school discrimination lawsuit, it is consistent with the Fourteenth Amendment. This conclusion is consistent with those of other federal courts who have considered similar policies. For instance, the Third Circuit held that a voluntary policy of race conscious teacher assignments, adopted by the Philadelphia Board of Education, did not violate the Fourteenth Amendment. *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3d Cir. 1984). *See Also Zaslawsky v. Board of Education*, 610 F.2d 661 (9th Cir. 1979) (voluntary plan); *Vaughns v. Board of Education of Prince George's County*, No. 72-325-K (D.Md. July 16, 1990) (same). In *Kromnick*, the court commented:

> Since the [Board policy of assigning teachers to schools on the basis of their race] is racially neutral, requiring the transfer of both black and white teachers, and there has been no showing of disparate impact upon one race, it is questionable whether the policy is one effecting a discrimination of a constitutional dimension.

739 F.2d at 903.[16] The staff racial balance policy in the present case, although race conscious generally like the one in *Kromnick*, is similarly specific race neutral.

Circuit's conclusion in *Deal v. Cincinnati Board of Education*, 419 F.2d 1387, 1393-94 (6th Cir. 1969), that the Board was not discriminating in the assignment of teachers, alters the applicability of *Swann*.

[16] The *Kromnick* court went on to apply the intermediate level of scrutiny suggested by four members of the Court in *Regents of the University of California v. Bakke*, 438 U.S. 265, 359 (1978) (a racial classification is supportable if it "serve[s] important governmental objectives" and is "substantially related to the achievement of those objectives"). 739 F.2d at 903. The *Kromnick* court then concluded that the program in question met the *Bakke* standard. *Id.* If this Court were to apply the same level of scrutiny to the policy in the case before it, it would reach the same conclusion. However, the staff racial balance policy in question is no longer a voluntary one; rather, it is an order of this Court. Accordingly, it is authorized by *Swann*.

Nonetheless, although not specifically mentioning *Swann*, Plaintiffs would have this Court apply the strict scrutiny analytical framework of *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989) and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), to determine whether the staff racial balance policy, as implemented by the Defendants, offends the Fourteenth Amendment. For reasons that follow, the Court rejects the Plaintiffs' premise that *Wygant* and *Croson* apply.

First, the present case involves a type of policy that was sanctioned by *Swann*. Neither *Wygant* nor *Croson* purports to overrule *Swann*, explicitly or implicitly. There is no suggestion in either *Wygant* or *Croson* that teacher assignment plans such as the staff racial balance policy herein, which are adopted pursuant to the command of *Swann* as part of a plan to settle a school desegregation suit, are no longer permitted.[17] Second, the governmental plans challenged in *Croson* and *Wygant* are different from the policy currently under review. In *Croson* and *Wygant*, the challenged action by the government involved the favored treatment of one race over another, a minority set aside program in *Croson* and a favorable lay-off policy in *Wygant*. Here, although the staff racial balance policy is race conscious generally, it is specific race neutral. The staff racial balance policy does not favor one race over the other, and it does not implicate hiring, firing or promotion decisions; it only affects the school to which a teacher will be assigned. Hence, the strict scrutiny test is not applicable.

Based on the foregoing, the Court concludes that the staff racial balance policy, as implemented by the Defendants, does not violate the Equal Protection Clause of the Fourteenth Amendment.

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[17] *See* footnote 15, above.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the present case pursuant to 28 U.S.C. § 1441 and principles of pendent jurisdiction.

2. In order to determine whether a party is entitled to a preliminary injunction, a trial court must consider four interrelated factors:

   a. Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;

   b. Whether the plaintiffs have shown irreparable injury;

   c. Whether the issuance of a preliminary injunction would cause substantial harm to others;

   d. Whether the public interest would be served by issuing a preliminary injunction.

NAACP v. City of Mansfield, 866 F.2d 162 (6th Cir. 1989).

3. Based upon the its prior discussion, the Court concludes that the Plaintiffs' have failed to demonstrate any likelihood or probability of success on the merits of either their contractual or constitutional claims.

4. The Plaintiffs have shown irreparable injury in that the staff racial balance policy, as implemented, will deprive them of professional and career enhancement opportunities, the loss of which cannot be compensated for in monetary terms.

5. The issuance of an injunction in this case would cause substantial harm to the Defendants in that it would be much more difficult for the Defendants to carry out their obligations under the *Bronson* consent decree. The *Bronson* consent requires that the Board maintain the staff racial balance policy, so that all schools have a per-

centage of black teachers which is within five percent, plus or minus, of the percentage of black teachers in the system as a whole. The issuance of an injunction would make compliance with this mandate more difficult, if not impossible. By tying the hands of the Board in the implementation of the staff racial-balance policy, the Board would be unable to stem the flow of teachers from a school which is already out of compliance with the plus or minus 5 percent mandate. The situation would thereby worsen, impacting upon the Board's ability to carry out the *Bronson* mandate.

6. The harm which the Defendants will suffer if an injunction is issued is greater than that harm the Plaintiffs will suffer as a result of the denial of an injunction.

7. The public interest would not be served by the issuance of an injunction. Rather, the public interest will be served by the carrying out of the consent decree.

8. Based upon the foregoing, the Court hereby denies Plaintiffs' motion for a preliminary injunction.

CLOSING REMARKS

This is a particularly difficult case, not as much for the issues presented as for the interests affected. This case pits the interests of the Defendants and *Bronson* Plaintiffs in quality integrated education, against the Plaintiffs herein who understandably have similar interests and who have consistently supported quality integrated education, yet who now find their personal and professional aspirations frustrated by the manner in which one method of achieving that goal impacts on those aspirations. The Court has concluded that neither the collective bargaining agreement nor the Fourteenth Amendment serve as a basis for the relief the Plaintiffs request.

However, there is an alternative approach which the Court would suggest to the parties. As the Court has

mentioned before in this decision, there is nothing immutable about the way in which the Defendants implement the command of the *Bronson* consent decree, as long as they maintain the staff racial balance policy and retain the power to take the necessary steps to see that it is enforced. Simply stated, the manner in which the policy is implemented is a subject about which the CFT and the Defendants may wish negotiate either when the present collective bargaining agreement expires, or when the Court terminates its jurisdiction over the *Bronson* consent decree.[18] *Moreover*, the Court sees no reason why some accommodation cannot be reached within the context of resolving this lawsuit. The presence of the *Bronson* Plaintiffs as *amici* in this action should ease the process. Their presence will give them the ability to protect their interests under ¶ 5 of the consent decree. Therefore, the Court strongly suggests that the Plaintiffs, Defendants and *Bronson amici* attempt to settle this lawsuit rather than litigating further either on appeal of this decision to the Sixth Circuit or at trial on the merits of this lawsuit before this Court.

Counsel listed below should take note that a conference call will be held on Tuesday, August 21, 1990, at 4:30 p.m., for the purpose of determining further procedures in the captioned cause.

/s/ Walter Herbert Rice
WALTER HERBERT RICE
United States District Judge

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[18] The Defendants must realize that if they bargain away too much of their discretion to implement the staff racial balance policy, during the period of this Court's continuing jursidiction over the *Bronson* settlement, they may not be able to comply with ¶ 5 of the consent decree, and as a result, they would have to answer to this Court.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-90-449

Judge Walter Herbert Rice

BEA JACOBSON, *et al.*,
Plaintiffs,

vs.

CINCINNATI BOARD OF EDUCATION, *et al.*,
Defendants.

DECISION AND ENTRY CONSOLIDATING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION WITH TRIAL UPON THE MERITS OF PLAINTIFFS' COMPLAINT; FINAL JUDGMENT ON PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF ENTERED IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFFS; TERMINATION ENTRY

[Filed Sep. 13, 1990]

Pursuant to the Motion of the Plaintiffs and, further, pursuant to Fed. R. Civ. P. 65(a)(2), the Plaintiffs' Motion for Preliminary Injunction is hereby consolidated with trial upon the merits of the captioned cause, insofar as Plaintiffs' claims for injunctive relief are concerned. Pursuant to this Court's review of the entirety of the file, including, but not limited to, the testimony set forth during an oral hearing on the Plaintiffs' Motion for Pre-

liminary Injunctive Relief, and the exhibits offered to the Court at said hearing and, finally, upon the representation of the Plaintiffs that they have no further testimony to offer, upon any hearing on the merits of their claim for injunctive relief, above and beyond that which they have already offered during the aforesaid hearing on their Motion seeking a preliminary injunction, final judgment on the Plaintiffs' claims for injunctive relief is hereby ordered entered in favor of the Defendants and against the Plaintiffs herein.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

/s/ Walter Herbert Rice
WALTER HERBERT RICE
United States District Judge

Copies mailed to:

Donald J. Mooney, Esq.
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Case Number: C-1-90-449

BEA JACOBSON, *et al*

v.

CINCINNATI BOARD OF EDUCATION, *et al.*

JUDGMENT IN A CIVIL CASE

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of the Defendants and against the Plaintiffs; that the above captioned cause is hereby terminated.

Date September 13, 1990

KENNETH J. MURPHY
Clerk

/s/ E. Osborn
(By) Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 90-3739/3840

BEA JACOBSON; THIRILEEN KING; BONITA WHITE; CLARICE CUMMINGS; MARTHA RETIC; MARILYN ROSSER; LINDA YOUNG; ROSA MONTGOMERY; CINCINNATI FEDERATION OF TEACHERS,

Plaintiffs-Appellants,

v.

CINCINNATI BOARD OF EDUCATION;
LEE ETTA POWELL, Doctor,

Defendants-Appellees.

Before: Kennedy and Norris, Circuit Judges; Miles, Senior District Judge

JUDGMENT

[Filed Mar. 31, 1992]

ON APPEAL from the United States District Court for the Southern District of Ohio at Dayton.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
LEONARD GREEN,
Clerk

Issued as Mandate:
April 22, 1992

COSTS: None

Filing Fee ..... $
Printing ..... $
Total ..... $

A True Copy.
Attest:

/s/ Valerie Fields
Deputy Clerk

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have

engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.